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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILL BUTLER,

Plaintiff-appellant

v.

CHRYSLER CORPORATION;
COMPUWARE CORPORATION,
doing business as Professional Services

)
)
) ORDER
)
)
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)
)

Before: BATCHELDER, GIBBONS and MCKEAGUE, Circuit

Bill Butler, a Michigan resident , appeals pro se a district court order dismissing a complaint he filed on the ground that it was barred by res judicata. This case has been referred to a panel of the court to Rule 34(j)(11), rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App.P.34(a)

Butler filed his complaint, alleging that it was a "civil rights' action. According to the complaint, Butler was employed by the defendants as a mechanical engineer until hid firing in 1998. Subsequently, when seeking new

employment, he alleged that defendants told prospective employers that he never worked there, thus preventing him from obtaining a new job.

Defendants moved for dismissal of the complaint, arguing that it was barred by *res judicata* because Butler had unsuccessfully pursued a defamation action in the Michigan state courts, which showed that they had been granted judgment because Butler provided no evidence that any prospective employer had failed to hire him based on the defendants' refusal to acknowledge his employment. Butler pursued this case through the state court system to Michigan Supreme Court.

This complaint was referred to a magistrate judge who heard oral argument on the motion to dismiss and Butler's response. The magistrate judge's report and recommendation, after first stating that the motion to dismiss would be converted to a motion for summary judgment, recommended that the motion to dismiss be granted. the district court adopted this recommendation over Butler's objections This appeal followed.

Initially, it is noted that although Butler characterized this as a civil rights action, the named defendants could not be sue under 42 U.S.C. 1983, as neither is a state actor. *Polk County v. Dodson*, 454 U.S. 321,318-19 (1981). The complaint also contained no allegations of employment discrimination on the basis of Butler's membership in a protected group, nor any indication that he had filed a charge with the E.E.O.C. and received a notice of the right to sue, in order to file a complaint of employment discrimination. *Puckett v. Tenn Eastman Co.*, 889 F.d 1481,1486 (6th Cir. 1989).

Moreover, even construing the complaint liberally as a diversity deformation claim it was properly found barred by res judicata. Whether defendants' motion was construed as one for dismissal or summary judgment, decisions relying on res judicata are review de novo. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573,582 (6th Cir 1994). This complaint was barred by res judicata because Butler had filed a prior action which was decided on its merits, raising the same issue against the same defendants *Reithmiller v.*

Blue Cross & Blue Shield of Mich., 824 F.2d 510, 511 (6th Cir, 1987). Although Butler does not believe that his claim was fairly addressed by the state court, an appeal from a unfavorable result in state court is not available in federal district court. *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 510 (6th Cir.2000).

The district court's order is therefore affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BT ORDER OF THE COURT

s/ _____

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

KENTUCKY-MICHIGAN-OHIO-TENNESSEE

In re:

No. 04-6-351-50

Complaint of Judicial Misconduct

ORDER

A complaint of judicial misconduct having been filed by Bill Butler against the Honorable John Feikens, United States District Judge for the Eastern District of Michigan, and the Honorable Virginia M. Morgan, United States magistrate Judge for the Eastern District of Michigan, pursuant to 28 U.S. C. 351 and the complaint having been review by the Chief Judge of the circuit pursuant to 28 U. S. C. 352.

It is ORDERED that, for the reasons contain in the attached memorandum, the complaint shall be dismissed pursuant to 28 U. S. C. 352(b)(1)(A)(ii) and Rule 4(c)(2) of the rules of Governing Complaints of Judicial misconduct or Disability.

s/ _____

Danny J Boggs

Chief Judge

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

KENTUCKY-MICHIGAN-OHIO-TENNESSEE

In re:

Complaint of Judicial Misconduct No. 04-6-351-50

MEMORANDUM

This complaint was filed with the Judicial Council of the Sixth Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, P. L. 96-458, as amended by the Judicial Improvements Act of 2002, Pub. L. No. 107-203, and the Rules Governing Complaints of Judicial Misconduct adopted by the Judicial Council of the Sixth Circuit. The Act and Rules provide for the initial screening of complaints by the Chief judge of the circuit. The chief judge may dismiss the a complaint:

- (a) that is frivolous; that directly relates to the merits of a decision or procedural ruling of a judge:

(b) that fails to allege conduct or a condition of a judge or magistrate which is prejudicial to the effective and expeditious administration of the business of the courts.

This complaint of judicial misconduct filed by a pro se litigant in a civil case against the district judge and magistrate judge who were assign to his case. The gravamen of his complaint is that the magistrate judge's report and recommendation and the district judge's order overruling his objection and adopting the magistrate judge's report and recommendation ignored the arguments that he advanced in support of his view of his case.

Based on the foregoing, it is clear that the complaint is directly related to the decisions or procedural rulings of the judges who are the subject of the complaints and therefore is subject to dismissal. See *In re Complaint of judicial Misconduct*, 858 F.2ddd 331 (6th Cir.1988).

s/ _____

Danny Boggs, Chief Judge

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

KENTUCKY-MICHIGAN-OHIO-TENNESSEE

In re:

* No. 04-6-351-50

Complaint of Judicial Misconduct

ORDER

On Petition to Review an Order of Dismissal

Pursuant to 28 U. S. C. 357 and rule 5 of the Judicial Council of the Sixth Circuit Governing Complaints of Judicial Misconduct or Disability, the complainant has filed a petition for review of an order entered by Chief Judge on January 24, 2005 dismissing the complainant's complaint of judicial misconduct pursuant to 28 U. S. C. 352(b)(1)(A)(ii) and rule 4(c)(2) of the Rules Governing Complaints of Judicial Misconduct or Disability.

The petition for review was considered by the Judicial Council of the Sixth Circuit * pursuant to Rule 8(c) of the Rules Governing Complaints of Judicial Misconduct or Disability at a meeting of the council held on June 26, 2005. All members of the council who

were present voted for affirmance of the dismissal of the complaint, the order of dismissal will be affirmed. It is therefore ORDERED that the Chief Judge's order of dismissal of the complaint be affirmed pursuant to 28 U. S. C. 357 and Rule 8 of the Rules Governing Complaints of Judicial Misconduct or Disability.

✓ _____

Boyce F. Martin, Jr.

Acting Chief Judge

*Chief Circuit Danny J. Boggs took no part in the consideration of the petition for review or entry of this order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILL BUTLER,

Plaintiff,

Civil No. 04-71173
Hon. John Feikens

v.

DIAMLERCHRYSLER CORP., and
COMPUWARE CORP. d/b/a
Professional Services,

Defendants,

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

The court having reviewed the Magistrate Judge's
Report and Recommendation, filed on 7/30/2004, the
objections by the plaintiff filed on 8/11/2004, and defendant
DaimlerChrysler's Response to the Objections filed on
8/11/2004,

IT IS ORDERED that the report and recommendation
is accepted and defendants' Joint Motion to dismiss is
granted and the case is dismissed.

s/ _____

John Feikens

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILL BUTLER,

Plaintiff,

CIVIL ACTION NO.

DAIMLERCHRYSLER CORP.,

04 CV 71173 DT

and COMPUWARE CORP., d/b/a

PROFESSIONAL SERVICES,

Defendants

DISTRICT JUDGE JOHN FEIKENS

MAGISTRATE JUDGE VIRGINIA M. MORGAN.

REPORT AND RECOMMENDATION

Introduction

Defendants DaimlerChrysler Corporation

("DaimlerChrysler") and Compuware Corporation d/b/a

Professional Services ("Compuware") have filed this joint motion to

dismiss pursuant to Fed.R.Civ.P. 12 (b)(6). The motion has been

referred to this court. Oral argument was heard on June 28, 2004.

Defendants argue that Plaintiff Bill Butler's claim is precluded by

the doctrine of res judicata, based on prior judgments in state courts from the circuit, appellate and supreme courts of Michigan. Plaintiff filed a response to defendants' motion. Defendants filed "objections" to Plaintiff's response. For the reason stated in this Report, it is recommended that the Motion be granted and the case dismissed.

BACKGROUND

Plaintiff has brought this suit alleging civil rights violations under 42 U. S. C. 1983, specifically with regard to his employment history. Plaintiff had been in the employ of MIS international ("MIS"), a contract services agency. MIS was later purchased by Compuware and renamed "Professional Services". Plaintiff was placed at then-Chrysler Corporation¹ as a mechanical design engineer. MIS terminated Plaintiff in October 1998. Plaintiff subsequently began to search for new employment. Plaintiff claims, that while in the process, Defendants knowingly defamed Plaintiff and hindered his employment search by refusing to acknowledge employment at either entity.

Plaintiff brought defamation suit against both DiamlerChrysler and Compuware in Oakland County Circuit Court. On December 13, 2000 summary disposition was granted to

Defendants with regard to Plaintiff's original complaint, with leave to amend. Plaintiff did so amend and summary disposition was granted as to the as to the amended complaint on April 29, 2002.

Plaintiff appealed as of right to Michigan Court of Appeals. On December 4, 2003, the Court of Appeals affirmed the trial court stating, "A motion under MCR 2.116 (C)(10) (for summary disposition) tests the factual sufficiency of the complaint... Plaintiff failed to provide evidence to support his claim." (Citation Omitted) Plaintiff then petitioned the Michigan Supreme Court for immediate consideration and the application for leave to appeal the judgment of the Court of Appeals. On February 27, 2004, immediate consideration was granted and the application for leave to appeal was denied.

Failing to have succeeded on any of his claims in the Michigan courts, Plaintiff brought suit on March 30, 2004 in this federal court. Plaintiff alleges, without statutory reference, violation of his civil rights with respect to his employment history, claiming the aforementioned failure to properly report his employment history. On April 16, 2004, Defendants moved to dismiss pursuant

to Fed.R.Civ.P.12 (b) (6) alleging that plaintiff's suit precluded by the doctrine of *res judicata*.

ANALYSIS

Defendants seek dismissal of the instant action based on Fed.R.Civ.P.12 (b)(6), alleging Plaintiff has failed "to state a claim upon which relief can be granted," due to the doctrine of *res judicata*. "If *res judicata* is raised as an affirmative defenserule 12 (b) and rule 12 (c) both provide that the motion will be treated as one for summary judgment." Wright,Miller &Kane, Federal Practice and procedure: Civil 3d 2735.3 (1998). Fed.R.P. 12 (b) states:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are present to an not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 56(b) states the right of the "party against whom a claim...is asserted" to for summary judgment. Federal Rule of Civil Procedure 56(c) states:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled a judgment as a matter of law.

The standard for showing such a required absence of any issue of material fact is set forth in Federal Rule of Civil Procedure 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for .

The standard of showing such an absence of a "genuine issue of material fact" set forth Above in Fed R.Civ.P 56(e) has been summarized by the Sixth circuit. Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc., 32 F.3d 989,993 (6th Cir 1994). The court noted "On summary judgment motions, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the parties opposing the motion." Haverstick Enterprises, Inc. at 993 citing Matsushita Electric Industrial Co.,Ltd v. Zenith Radio Corp., 475 us 574, 587-88, 106 S.Ct.1348,1356,89 Led.2d 538 (1986). The court also noted, "However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial" Id. The court further clarifies the standard, stating "Summary Judgment must be entered against a party who failed to provide sufficient

evidence in support of an essential element of that party's case.

Haverstick Enterprises, Inc at 993 citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

In determining whether summary judgment motion can be granted to a party alleging res judicata, the Supreme Court has charted this route: "Under the Doctrine of res judicata, a judgement on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Parklane Hosiery Co v. Shore, 439 U.S. 322, 327, 99 S.Ct. 645, 649 (1979), citing J. Moore, Federal Practice 10.405[1], pp. 622-624 (2d ed. 1974). When, as in this action, the prior suit was adjudicated by the state courts and the related, succeeding case is a federal action, case law interpreting the Full Faith and Credit Clause of the Constitution must be followed. the codified language of the statute "reads in pertinent part:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.

28 U.S.C. 1738 quoted by *Migra v. Warren City school Dist Bd. of Educ.*, 465 U.S. 75,80, 104 S.Ct. 892, 896 (1984). It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Migra* at 81 citing *Allen v. McCurry*, 449 U.S. 90, 101S.Ct.411 (1980).

The Supreme Court has specifically addressed, however, the question of whether the law³ of *Allen* cited above by *Migra* is relevant to 42 U.S.C. 1983 actions. *Migra* dealt with the question of whether the *Allen* rule was applicable to claims, specifically civil rights questions, where the Federal government is entrusted with the power to determine whether such state civil rights law is unconstitutional. In *Allen*, the court consider whether 42 U.S.C. 1983 modified the operation of 1738 so that a state-court judgment was to receive less than normal preclusive effect in a suit brought in federal court under 1983." *Migra* at 81. The court explained, "[n]othing in the language of 1983 remotly expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. 1738... *Migra* at 82 citing *Allen* 449 U.S.

at 97, 101 S.Ct., at 416. "Allen therefore made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal 1983 suit as they enjoy in the courts of the State where the judgment was rendered. Migra at 83. While Allen ruled that issue preclusive effect can be given to state courts judgments in 1983 cases, Migra extended the rule to include the effect of claim preclusion as well. "[W]e must reject the view that 1983 prevents the judgment in the petitioner's state-court proceeding from creating a claim preclusion bar in this case.' Id at 84.

Migra also notes that a federal claim that could have been brought by a claimant in the prior state court suit is afforded the same preclusive effect as if it had been included. "Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court her claims and then turn to federal court for adjudication of her federal claims." Id. at 85.

Plaintiff did not specifically raise 42 U.S.C. 1983 as the statute under which his claim is brought. However, Plaintiff explicitly states "his civil rights have been violated" as well as

noting on the "Civil Cover" sheet "Federal Question" jurisdiction, with "Employment" selected under the "Civil Rights" category.

Since 1983 claims have the same preclusive effect afforded other claims under 28 U.S.C 1738 under the rulings of Allen and Migra, Michigan's res judicata case law must be applied to the instant action. in Michigan, "[t]here are three prerequisites to the application of the res judicata doctrine: (1) there must have been a prior decision on the merits; (2) the issues must have been resolved in the first action, either because they were actually litigated or because they might have been presented in the first action; and (3) both actions must be between the same parties or their privies." *VanDeventer v. Michigan National Bank*, 432 N.W.2d 338, 342 (Mich.App. 1988) citing *Sloan v. Madison Heights*, 425 Mich 288, 295, 389 N.W.2d 418 (1986). Defendant also notes in its briefs the additional rule in *VanDeventer* that "Michigan courts apply the res judicata doctrine broadly so as to bar claims that were actually litigated as well as claims arising out of the same transaction which a plaintiff could have brought, but did not." *VanDeventer* at 342 citing *Gose v. Monroe Auto Equipment Co.* 409 Mich. 147, 169, 294 N.W. 2d 165 (1980).

Applying the Sloan standard, there has been a "prior decision on the merits" in this matter. Plaintiff's first complaint was decided in Defendants' favor on a motion for summary disposition. The order was granted pursuant to MCR 2.116 (C)(10). MCR 2.116 (C)(10). states:

(C) The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

(10) Except as to the amount of damages, there is not genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of the law.

In Michigan, "summary judgment the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of *res judicata* ." Capital Mortg. Corp.v.Coopers & Lybrand, 369 N.W. 2d 922,924 (Mich. App.1985) citing City of Detroit v. Nortown Theater Inc. 323 N.W>.2d 411, (Mich. App. 1982). As noted the Michigan Court of Appeals affirmed the decision of Oakland County Circuit Court on December 4, 2003.

The Michigan Supreme Court denied leave to appeal on February 27, 2004.

The second prerequisite needed to apply the doctrine of res judicata has been satisfied as well. Plaintiff has brought no allegations which were not litigated in the first action. The claim is based on the same facts and allegations, specifically the Defendants companies defamed the Plaintiff during his employment search. While Plaintiff brings this claim under the auspices of a 1983 claim separate from his state court defamation claim, it is well established that such an action is held to the same standard for claim preclusive purposes. *Migra, supra*. Plaintiff has alleged that one of the bases for his federal claim is that Michigan state courts "in his case were incompetent." Plaintiff's usage of "incompetent" however is incorrect and not valid challenge to the court's competency. The "competency" of the proceedings refers not to the conduct of the court nor the outcome of the case nor Plaintiff allegations of misconduct, but rather the appropriateness of the court jurisdiction. Plaintiff also alleges "incompetency" of the court in relation to what could be perceived as Plaintiff's own errors, claiming certain

depositions were not taken prior to the first action. This argument is also without merit.

Third both the state court actions and instant federal claim are between the same parties, having the same Plaintiff and Defendants. Based on the doctrine of res judicata, all prerequisites for a bar to Plaintiff's federal claim have now been satisfied. Defendants' motion pursuant to Fed.R.Civ.P. 12 (b)(6) should be granted.

CONCLUSION

Accordingly, it is recommended that Defendants' Joint Motion to Dismiss be granted and the case be dismissed.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for 28 U. S.C. 636 (b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right to appeal. *Thomas v. Arn* 474 U.S. 140(1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir.1991); *United States v. Walters*, 638 F.2d947,949-50 (6th Cir.1981). The filing of objections which raise

some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373, (6th Cir.1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

s/ _____

VIRGINIA M. MORGAN

UNITED STATES MAGISTRATE

JUDGE

Order

Entered: February 27, 2004

125344 & (48)

Bill Butler,
Plaintiff-Appellant,

v

CHRYSLER CORPORATION and
COMPUWARE CORPORATION
d/b/a Professional Services,
Defendants-Appellees

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 125344
COA: 241413
OAKLAND
CC: 00-022028-CL

_____/

On order of the Court, the motion for immediate consideration and the application for leave to appeal the December 4, 2003 judgment of the Court of Appeals are considered. Immediate consideration is GRANTED. The application for leave to appeal is DENIED, because we are not persuaded that the questions presented should be reviewed by this court.

s/ _____

Corbin R. Davis
Clerk of the Michigan Supreme
Court

Michigan Supreme Court
Office of the Clerk
Michigan Hall of Justice
P.O.Box 30052
Lansing, Michigan 48909
Phone (517) 373-0120

January 6, 2004

Mr. Bill Butler
27810 Ryan Rd.
Warren, Mi 48092

Re: Butler v Chrysler Corp, Supreme Court # 125344

Mr. Butler:

Your application for Leave to Appeal in the above-referenced matter has been received and filed by this office and will be submitted to the court for its consideration on after January 5, 2004.

By copy of this letter, other counsel are advised that an answer to you application may be filed with this office. You and all other parties will be advised by mail when the Court has taken action.

CORBIN R. DAVIS

Supreme Court Clerk

CRD/cc

cc: John J. Ronayne III, Esq

Judith E. Caliman, Attorney

STATE OF MICHIGIAN
COURT OF APPEALS

BILL BUTLER,

Plaintiff-Appellant,

v

UNPUBLISHED

December 4, 2003

No. 241413

Oakland Circuit Court

LC No. 00-022028-CL

CHRYSLER CORPORATION and
COMPUWARE CORPORATION, d/b/a

Defendants-Appellees.

Before: Murray, P.J. and Gage and Kelly, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition under MCR 2.1166(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214.(E).

Plaintiff brought this defamation action based on Defendants' failure to supply information about plaintiff's

employment history to prospective employers. Plaintiff asserted that when prospective employers checked his employment history, defendants denied that plaintiff ever worked for them. Plaintiff claimed that this denial constituted defamation that deprived him of employment.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff failed to provide evidence to support his claim. Plaintiff asserted that potential employers contacted defendants, and were told that there was no record of plaintiff's employment. Yet the official of the only potential employer identified by the plaintiff indicated that she did not make any contact with the defendants. Challenging the official's credibility does not create

admissible evidence in support of the plaintiff's claim. The trial court properly granted defendants' motion.

Affirmed.

/s/Christopher M. Murray

/s/Hilda R. Gage

/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BILL BUTLER,

Plaintiff,

-v-

No. 00 022038 CL

CHRYSLER CORPORATION and
COMPUWARE CORPORATION,
d/b/a PROFESSIONAL SERVICES,

Defendants.

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OPINION AND ORDER REGARDING DEFENDANTS'
MOTIONS FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse
in the city of Pontiac, County of Oakland, and State
Of Michigan on April 29, 2002

PRESENT: HONORABLE RICHARD D KUHN, CIRCUIT JUDGE

This matter is before the court on Defendant DaimlerChrysler's Motion to Enforce Order Granting its motion for Summary Disposition and Defendant Compuware Corporation's motion for Summary Disposition. The court heard oral argument and took the motions under advisement.

This an action for defamation. Plaintiff was a contract employee of MIS International, later purchased by Compuware, and was assigned to work for Chrysler, now DaimlerChrysler. Chrysler terminated Plaintiff, and he began to search for new employment. Plaintiff alleges that defendants falsely informed his potential employers that he never worked for them.

On December 13, 2000 this court granted DaimlerChrysler's Motion for summary Disposition as to Plaintiff's original complaint, pursuant to MCR 2.116 (C)(8). But granted plaintiff leave to amend the Complaint. Plaintiff did so.

DaimlerChrysler now moves for summary disposition as to Plaintiff's Second Amended Complaint, again pursuant to MCR 2.116(C)(8). 'A motion for summary disposition under MCR 2.116 (c)(8) tests the legal sufficiency of a claim to determine whether

the opposing part's pleadings allege a prima facie case.”

Wortelboer v Benzie Co, 212 Mich App 208, 217 (1995). All well-pleaded factual allegations are accepted as true. The motion should be granted only where the claim, based on the pleadings alone, is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Paul v Bogle*, 193 Mich App 479, 495-496 (1992).

This Court granted summary disposition previously because the complaint did not allege that Chrysler ever had a record of the plaintiff's employment by MIS at its facility. In the Second Amended Complaint, Plaintiff added allegations that Chrysler issued him a badge and corporate clearance, and that Plaintiff's Chrysler supervisor evaluated Plaintiff's performance at Chrysler on a Chrysler Corporation form. This would be evidence that Chrysler knew Plaintiff worked at its facility. Reckless disregard of the truth might be inferred from the fact that Chrysler subsequently told others he never worked there. Therefore, Chrysler is not entitled to summary disposition pursuant to MCR 2.116 (C)(3).

Defendant Compuware moves for summary disposition pursuant to MCR 2.116 (C)(10). DaimlerChrysler joined in the motion. A motion under MCR 2.116 (C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

In reviewing a motion for summary disposition brought under MCR 2.116 (C)(10), a trial court considers affidavits' pleadings, depositions, admissions, and documentary evidence filed in the action of submitted by the parties, MCR 2.116 (G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116 (C)(10) if the affidavits or other documentary evidence show there is no genuine issue in respect to any material fact, and moving party is entitled to judgment as a matter of law. MCR 2.116 (C)(10).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, deposition, admissions, other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420, 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a

nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v Walter Thompson*, 437 Mich 109, 115, 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Smith v Globe Life Insurance Company, 460 Mich 446; 597NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358,362-363, 547 NW2d 31 (1996).

In his Second Amended Complaint, Plaintiff alleged that he applied at Combustion Components, Inc., and “learned from one Barbara _____ the interviewer, that both Chrysler Corporation and MIS International denied plaintiff ever worked for their company.” In support of its motion, Compuware submitted the deposition transcript of Barbara Hurley. She interviewed Plaintiff in Connecticut for the position with Combustion Components, Inc. At her deposition, she testified that she never talked to anyone at MIS, Compuware or Chrysler about Plaintiff’s

employment history. In response to the question, "Did you ever call up Mr. Butler and ask him and make a statement that, "Your Ford reference looks good, but what happened at Chrysler ?", she stated , "I don't recall that, no."

In response to the motion, plaintiff submitted the long distance telephone for the Connecticut company. Plaintiff claims the records show a call to Chrysler. DaimlerChrysler acknowledged that Plaintiff did show that a telephone call was placed to Chrysler. However, there is no proof that Ms. Hurley spoke to anyone, or what the content of any conversation may have been

Plaintiff may not rely on his allegation in the Second Amended Complaint, That he "learned from one Barbara _____ the interviewer, that both Chrysler and MIS International denied plaintiff ever worked for their company.", to raise a fact issue about the existence of the allegedly defamatory statement, because in summary disposition motion under subrule (C)(10), a non-moving party may not rely on mere allegations in pleadings.

Plaintiff also submitted a letter from a private investigator he hired, stating that the private investigator called MIS,

Compuware and Chrysler, and that all three stated they had no record of employment for a person with Plaintiff's name and social security. However even assuming that this letter is admissible, it does not support plaintiff's allegation that the defendant companies reported such information to his prospective employers. The same is true of a newspaper article submitted by the Plaintiff, where a staff writer states that calls by her newspaper yielded similar results to those of the investigator's.

For all of the above reasons, both Chrysler and Compuware are entitled to summary disposition pursuant to MCR 2.116 (C)(10).

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Chrysler's Motion for Summary Disposition pursuant to MCR 2.116 (C)(8) is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Compuware and Chrysler's motion for Summary Disposition pursuant to MCR 2.116 (C)(10) is granted.

IT IS FURTHER ORDERED AND ADJUDGED pursuant to MCR 2.602 (A)(3) that this Opinion and Order resolves the last pending claims and closes the case.

s/ _____

RICHARD D. KUHN

CIRCUIT JUDGE

**MICHIGAN CIVIL PROCEEDURE
MEDIATION AND OFFERS OF JUDGMENT**

3. Remand to District Court

11.53 There is no longer any rule providing for the remand of cases from circuit to district court because the mediation award is less than the district court jurisdictional limit.

Before January 1997, MCL 600.641, MSA 27A.641 authorized the removal of actions from circuit court to district court if the amount of damages sustained might be less than the jurisdictional limit for the district courts. The statute was implemented by court rule, MCR 4.003. Effective January 1, 1997, both MCL 600.641 MSA 27A.641 and MCR 4.003 were repealed.

There is still a circuit court rule on the transfer of actions, MCR 2.227. However, a circuit court may not transfer an action to a district court under MCR 2.227 based on the amount in controversy unless the parties stipulate to the transfer or "[f]rom the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit for the district court." AO 1998-1. The amount of the mediation award thus has no bearing on the transfer of cases from circuit court to district court.

STATE OF MICHIGAN
IN THE 50TH JUDICIAL DISTRICT COURT

BILL BUTLER,

Plaintiff,

Case no. CC-000077

-versus-

Hon. Christopher C. Brown

**CHRYSLER CORPORATION
and COMPUWARE CORPORATION,
d/b/a PROFESSIONAL SERVICES**

Defendants.

**Telephone deposition of BARBARA HURLEY, taken
pursuant to the Federal Rules of Civil Procedure, at Combustion
Components Associates, Inc., 884 Main Street, Monroe
Connecticut, before Cheryl M. Alonza a Notary Public in and for
the State of Connecticut, on April 24, 2001 at 11:40 AM.**

A P P E A R A N C E S:

For the Plaintiff: (Via telephone).

**RICHARD A. MEIER
30300 Northwestern Highway, Suite 320
Farmington Hills, Michigan 48334**

For the Defendant Compuware Corporation: (Via telephone)

KASIBORSSSKI, RONAYNE & FLASKA
1900 Buhl Building
535 Griswold
Detroit, Michigan 48226-36886
BY: L. JEAN BENOIT, ESQ

For the Defendant Chrysler Corporation: (Via telephone)

DaimlerChrysler Corporation
1000 Chrysler Drive
Auburn Hills, Michigan 48326-2766
BY: WILLIAM McCANDLESS, ESQ

ALSO PRESENT: JOHN F. HURLEY
EDWARD H. BIRD

STIPULATEDS

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that all technicalities as to proof of the official character before whom the deposition is to be taken are waived.

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties hereto that the reading and signing of the deposition by the deponent are waived.

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties hereto that all objections, except as to form, are reserved to the time of trial.

BARBARA HURLEY

50 Sunny Ridge Road, Easton Connecticut, called as a witness, having been first duly sworn by Cheryl M. Alonza, a Notary Public in and for the State of Connecticut, was examined and testified as follows:

MS. BENOIT : For the record, my name is Jean Benoit. I represent the defendant Compuware in this matter. This is a deposition of Barbara Hurley, which is taken pursuant to Notice for all purposes provided under Michigan Court Rules.

DIRECT EXAMINATION

BY MS. BENOIT:

Q. Good Morning, Miss Hurley

A. Good Morning.

Q. I just have a few questions for you, which were pretty much reflected in the affidavit that you already provided to us.

Q. As a beginning, who is your employer

A. I work for Combustion Components associates in Monroe, Connecticut.

Q. What is the address for Combustion Components Associates?

A. 884 Main Street in Monroe, Connecticut.

Q. What is your position there

A. I am the manager of product assurance.

Q. How long have you been employed there?

A. About two-and-a-half years.

Q. During your tenure there, did there come a time when Combustion Components Associates needed to fill an engineering position?

A. Yes, there did.

Q. Who was responsible for that process?

A. There were several people involved. I coordinated it.

Q. Did Combustion Components receive a resume from William E. Butler?

A. Yes, we did.

MS. BENOIT: If the court reporter could present the exhibit to the witness, I'd appreciate it.

A. I have it.

MS. BENOIT: I ask this be admitted as an exhibit. without objection.

MR. MEIER: No Objection

MR. McCANDLESS: I have no objection

(Defendant's Exhibit 1 marked for Identification

Q. Miss Hurley, is this a copy of the resume you received for Mr. Butler?

A. Yes

Q. What company did Mr. Butler's resume identify as his immediate past employer?

A. MIS International Autoflex Incorporated from Bloomfield Hills, Michigan

Q. Was Mr. Butler interview by Combustion Components?

A. Yes

Q. What was the date of the interview?

A. June 3rd of 1999.

Q. During the course of that interview, did you learn the circumstances of Mr. Butler's termination from MIS International?

A. Not the circumstances, I did learn that he was let go on a Friday, with very little notice.

Q. Did Mr. Butler indicate that he'd also been replaced by a new employee on the following Monday?

A. Yes, he did.

Q. Based on the information that you received in the interview, did you conclude that Mr. Butler had left the employ of MIS on good terms?

A. I assume he didn't.

Q. Did you obtain the names of any references for Mr. Butler?

A. Yes. He gave me four.

Q. Okay. And did you contact any of the references?

A. I contacted one.

Q. And which reference was that?

A. A gentleman from Ford Marketing and Sales, a James, the last name is Doperak, D-o-p-i-r-a-k.

Q. Did you contact the Chrysler Corporation reference?

A. No, I did not.

Q. Did you attempt to contact any of the other references?

A. I don't remember. I may have I don't have any notes to the effect. I didn't talk to anyone else.

Q. Did Mr. Butler provide MIS international as a reference?

A. No, he didn't.

Q. Did you attempt to contact MIS International concerning Mr. Butler?

A. No, I didn't.

Q. Were you ever told by MIS International that Mr. Butler had not been their employee?

A. I never talked to anyone at MIS International.

Q. Were you ever told by Compuware Corporation that Mr. Butler had not been their employee?

A. I never talked to anyone at Compuware.

Q. Were you ever told by Chrysler Corporation that Mr. Butler had not been their employee?

A. I never talked to Chrysler.

Q. Could you repeat your answer?

A. I never talked to anyone at Chrysler.

Q. Thank you Who made the decision not to offer employment to Mr. Butler?

A. I think that there wasn't really a decision made. A former employee became available and wanted to return at the time, so that's what happened. We hired our former employee.

There was no decision made against Mr. Butler.

Q. So that was the only reason that it was decided not to offer him employment?

A. Yes. We had someone that we knew that wanted to return to work here.

that's all that I have.

CROSS-EXAMINATION

BY MR. MEIER

Q. Miss Hurley, this is Richard Meier. I'm the attorney for Bill Butler and I have some questions I'd like to ask you, too.

A. Okay

Q. Originally, When Mr. Butler came to your company for the interview, Did he interview with anyone in your company, besides yourself?

A. Yes. He talked to several people.

Q. Who would they have been?

A. I'm not sure whom. He talked to the people that were involved in the process, depending upon who was in the office, were John Hurley, the technical director. Ed Bird, who is our financial person, and there were our several senior engineers. Some may or may not have seen him. I don't really know. John Dale would have been one. Scott Lindeman would have been another one. I don't really know who he talked to in the engineering.

Q. Are you the only person that would check on references for an individual employee?

A. In this particular instance, yes I was the one given that charter.

Q. I take it Mr. Hurley and Mr. Bird have some kind of professional contacts in their area. Do they call those people ever for references to assist you?

MR. McCANDLESS: I object to the form. I don't understand the question. I think you are asking her to go into the minds of Mr. Hurley and Mr. Bird.

Q. Let me ask you this: Had Mr. Hurley or Mr. Bird ever assisted you in the past in getting references?

MR. McCANDLESS: Objection to relevance. Insofar as it relates to Mr. Butler, she already testified clearly that no one but her called about a reference. Go ahead you can answer the question.

MS. BENOIT: You can answer over his objection.

Q. Had Mr. Hurley or Mr. Bird ever assisted you in the past in getting references.

A. I don't think so.

Q. Did you go to lunch with Mr. Butler?

A. Yes I did.

Q. Where did you go to lunch?

A. A seafood restaurant close by.

Q. Did you have some kind of discussion concerning Mr. Butler's employment at lunch?

A. I don't really remember.

Q. Did you talk to him about any of his hobbies at lunch?

A. Yeah. He has several hobbies that we discussed.

Q. And did you talk to him about dating at lunch?

A. Dating?

Q. Yes

A. I don't think so.

Q. Did you talk to him about going to an art supply store in a nearby town?

A. Yes. His sister was looking for something and he was interested in getting it for her. I don't remember what it was, but I do remember talking about that, yes.

Q. Did you ever indicate to Mr. Butler at the end of the interview that that was one of nicest interviews you ever had with an employee.

A. I'm sure that I said something about enjoying lunch or enjoying talking to him. He's quite interesting person.

Q. My understanding is that two weeks later he caked you; is that correct?

A. I don't know.

Q. Did Mr. Butler call you two weeks later, after going to lunch with you.

A. I don't know. He called at some point wanting to know what the status of his proposed employment was. I don't know what you call it. He wanted to know what the status of things was.

Q. What did you indicated to him when he asked the question?

A. I told him that we were very interesting in him.

Q. Did you at that time ask for some references?

A. Possibly. I did at some point.

Q. So you indicated that you called the Ford reference Mr. Doperak?

A. Yes I talked to someone at Ford. Doperak, first name James.

Q. What kind of reference did Mr. Doperak give Mr. Butler?

A. A very good one.

Q. Do you know when you would have called Mr. Doperak, do your notes indicate that?

A. No, I sorry, they don't.

Q. You indicated that Mr. Butler gave you four references is that correct?

A. Yes.

Q. Why didn't you call the other three references after talking to Mr. Doperak?

A. I didn't see any point in spending any time on it. The Ford reference was excellent. We had liked Mr. Butler. Didn't seem to need to go on a witch hunt of any sort.

Q. Why do you call—You said that during your discussions or during reading the resume, you learned he had some problems at Chrysler, is that correct.

MR. McCANDLESS: I object to the form. That's not what she stated. She stated that his employment at MIS ended quickly.

Q. You learned those facts; is that correct?

MR. McCANDLESS: Objection. learn what facts?

Q. That his employment at MIS ended rather quickly?

A. All he told me is he left on a Friday, he was terminated on a Friday, and he was replaced on a Monday.

Q. But you didn't call to find out what the fact situation was concerning that; is that correct?

A. That's correct.

Q. Did you ever call up Mr. Butler and ask him and make a statement that, "Your Ford reference looks good , but what happen at Chrysler?"?

A. I don't recall that, no.

Q. When you say you "don't recall" it, it might have happened?

MR. McCANDLESS: Objection.

That's a mischaracterization of her previous testimony where she indicated categorically that she had not talked to Chrysler regarding Mr. Butler. You can answer the question.

The Witness: What was the question?

Q. Do you know whether or not you ever made calls to Mr. Butler and indicate to him that the Ford reference looked, what happened at Chrysler?

A. No. I wasn't under the impression that anything happened at Chrysler.

Q. So you are saying you definitely did not make that Call?

A. I'm saying---

MR. McCANDLESS: Objection Asked and answered.

A. I'm saying I don't recall that statement.

Q. And again, when you say you "don't recall" it , it may have happened?

MR. McCANDLESS: What may have happened? Mr. butler made a statement about that or that she called Chrysler?

Mr. Meier: That she made the statement.

Q. It may have happened, ma'am?

MR. McCANDLESS: Objection. Speculative.

Q. Go ahead and answer.

A. I don't know. I'm sorry. I don't know.

Q. So it could have happen?

MR. McCANDLESS: Objection

A. It could snow today, too.

Q. I want to know, could it have happen?

MR. McCANDLESS: You are asking for speculation. I object. I don't think that fair. The witness is under oath. If

you are asking her to speculate, she puts herself at risk. Go ahead, answer the question, ma'am, if you can.

A. I don't know. I'm sorry.

Mr. Meier I have nothing further.

MR. McCANDLESS: I have a couple of questions, ma'am.

RECROSS-EXAMINATION

BY MR. McCANDLESS:

Q. This is Bill McCandless. I represent DaimlerChrysler corporation.

With respect to his employment, where it references MIS International, if you had wanted to check on that reference, you should have called MIS, would you not, instead of Chrysler?

A. I don't know. I assume so.

Q. Okay that would be the normal process, that's the entity listed as his employer?

A. That would make sense, yeah.

MR. McCANDLESS: That's all I have. Thank you so much for your time.

The witness: You're welcome

Ms. BENOIT: Thank you.

(Deposition concluded: 11:50)

SANDERS, GALE & RUSSELL

203-624-4157

CERTIFICATE

I here by certify that I am a notary public, in and for the State of Connecticut, duly commissioned and qualified to administer oaths.

I further certify that the deponent named in the forgoing deposition was by me duly sworn and thereupon testified as appears in the forgoing deposition ;that said deposition was taken by me stenographically in presence of counsel and reduced to print under my direction, and the forgoing id true an accurate transcript of the testimony.

I further certify that I am neither of counsel nor related to either of the parties to said suit, nor am I interested in the outcome of said cause.

Witness my hand and seal as Notary Public this 24th day of

April 2001. s/ _____

Cheryl M. Alonza, LSR, #00104

My Commission expires: 7-31-01

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(Exhibit retained by the court reporter for inclusion in the original transcript)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF
OAKLAND

BILL BUTLER,

Plaintiff,

Case No. 00-022028-CL

v

Hon. Richard Kuhn

CHRYSLER CORPORATION, and

COMPUWARE CORPORATION

d/b/a PROFESSIONAL SERVICES

Defendants.

RICHARD A MEIER (P38204)
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Farmington Hills, Michigan 48334
(248) 932-3500
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Attorneys For Defendant Compuware Corporation

Judith E. Caliman (P43526)
Leon Hardiman (P451460)
DaimlerChrysler Corporation
1000 Chrysler Drive
Auburn Hills, Michigan 48326-2766

AFFIDAVIT OF BARBARA HURLEY

STATE OF CONNECTICUT SS:

COUNTY OF FAIRFIELD

Barbara Hurley, being duly sworn, deposes and says as follows:

1. I am employed by Combustion Components Associates, Inc., 884 Main Street, Monroe, Connecticut 06468 as the manager of Product Assurance.
2. When the need arose to fill a vacancy in an engineering position, I was the person given the responsibility of overseeing the process.
3. Combustion Components received a resume from William E. Butler. A copy is attached. Mr. Butler's resume identified MIS International as his immediate past employer.
4. Mr. Butler was interviewed by Combustion Components on June 3, 1999. During the interview process I learn from Mr. Butler that he was indicated that he had been laid-off on Friday and was replaced by a new employee the following Monday. Based on that information, I concluded that Mr. Butler had not left the employ of MIS International on good terms.

5. After some time after was interviewed at Combustion Components, I obtained from Mr. Butler the names of four references.

One was a Ford Motor reference with the whom I spoke; another was a Chrysler Corporation reference. I could not locate the Chrysler Corporation reference. I did not attempt to contact the other two references.

6. Because I had concluded that Mr. Butler did not leave the employ of MIS International on good terms, and because Mr. Butler

had not provided a reference from MIS International. I made no attempt to contact MIS International concerning Mr. Butler.

7. I was never told by MIS International that Mr. Butler had not been their employee.

8. I was never told by Chrysler Corporation that Mr. Butler had not worked at Chrysler.

9. The decision to not offer employment to Mr. Butler was made by senior engineering personnel based upon:

- a) his perceived technical ability,
- b) his salary expectation,
- c) the expenses that would be incurred in relocating him,

d) a former employee was seeking to return to work. The former employee had favorably impressed Combustion Components and was qualified for the position.

Further Affiant sayeth not.

s/ _____

Barbara Hurley

Subscribed and sworn to before me
this 22nd day of November, 2000

s/ _____

Ronald J. Consigli

Notary Public

Fairfield County, Connecticut

My Commission expires 4/30/03

P. O. BOX 1072, Arlington, Ma
781-643-2224

P. O. Box 35, N. Attleboro, Ma 02761
508-643-0250

TRACE
INVESTIGATION
SERVICES

December 17, 1999

Mr. William Butler

RE: MIS International et al.

Mr. Butler:

Per your request we have checked your post employment status with the above referenced business as well as other businesses related to your employment and we are forwarding the following information:

As you are aware MIS International was purchased by Compuware (31440 Northwestern Hwy, Farmington, Mi 48334) Compuware Human Resources Dept. was contacted (248-737-7300) and stated that under your social security number they have no record of employment. Further inquiries indicate a William T. Butler who was terminated in 1988, this individual having a different social security number.

Inquiries indicated that MIS International still maintained a listing at 445 Enterprise Ct, Bloomfield Hills, MI with a phone

number 248-253-9500. Calls to this number reached a person who answered the phone by stating "Professional Services" This individual stated that it had been MIS International and was now Compuware. The Human Resources department at this location also checked their records under your name and social security number and reported no record of your employment.

The Chrysler corp., to which you were assigned to their contract division, was contacted at its main offices at 800 Chrysler Dr. Auburn Hills, MI (248-576-6558). They also have no record of your employment. Attempts to reach the Neon division were unsuccessful as the main office states that the division and it's manager could be any where within the corporation (we found 8 locations for Chrysler in Michigan alone).

Should you have any questions regarding this information please contact our offices at (508) 643-0250.

Respectfully submitted,

/ _____

Tim Lampon

Trace Investigation Services, Inc

Lawsuit: Man wants career back

By Julie Brown
Staff Writer

Bill Butler's got a gap in his resume about 2 years. The 46-year-old former Westland resident says filling that gap is the key to continuing his career. Butler was fired by MIS international, a contract agency bought later by Compuware on Oct. 31, 1998. He was working on contract at then-Chrysler Corp. as a mechanical design engineer.

Butler said he was to get a review at the end of his contract, "It didn't happen," he said. "There were some issues with the different supervisors I worked for."

He cited one supervisor who liked hunting, which Butler does not. Butler, who earned a bachelor's degree in mechanical engineering from the University of Hartford in 1985, was dismissed.

"When they dismissed me, I didn't even ask what the reason was." He went to Massachusetts, his home state, to find work in New England.

Butler, now staying with a friend in Oak Park, Interview with Pratt & Whitney Aircraft, where he had worked nine years previously. He didn't get a job.

He interview with Combustion Components Associates Inc., giving former employers Ford Motor Co. and Chrysler as references. When questions arose about the Chrysler reference, Butler decided to do some probing.

He hired a investigator, Tim Lampron of Trace Investigation services, who reported Dec. 17, 1999 that there was no record of his employment With MIS International.

Observer calls yielded similar results, with Joni Dewan of Compuware human resources saying there was no record of such an employee. Barbara Maher of public relations at DaimlerChrysler said it would be necessary to have a supervisor's name to verify employment, and suggested contacting the contract employer,

John Ronayne, III, attorney for DaimlerChrysler, was contacted by the Observer for a statement Aug 29 and Sept. 11. He promised to contact Compuware's lawyer and release a statement, but never provided one.

Compuware attorney Judith Caliman did not respond to a Sept. 14 fax request for comments.

"I don't like to change jobs," Butler said citing his stints with Pratt Whitney Aircraft, Williams International in Walled Lake and two auto makers. He was with Williams International for four years, and had done factory work before and during college.

William, who is single said he has been staying with family and friends since losing his job. He's camped out as well, but considers himself basically homeless and is anxious to find work.

He relied on unemployment compensation early on and now is using his 401(k) money to live. Bill collectors are coming after him. "they're saying we have no record of him," Butler said of his former employer.

Butler has an attorney, Richard Meier who practices in Farmington Hills. "I don't think I've ever run across anything like this" Meier said. "It's a highly unusual case."

Meier said he was unsure if the employments had been lost. A defamation case has been filed in Oakland County Circuit Court, before Judge Richard Kuhn, with a motion filed to dismiss the case.

Kuhn has taken it under advisement, Meier said." It may go on for a while" Damages sought are unspecified, said Meier, who said the evidence supports Butler's complaint.

"This is my livelihood," Butler said. "People won't give me a job because of this situation."

He was unsuccessful at a grocery store and deli, too. In the last year and a half, Butler's been looking for work on the Web as well. Before Compuware hired a outside attorney, that business had agreed to call companies he'd interviewed with and pay any lost wages Butler said.

He's suing both Compuware and DaimlerChrysler. "I want my life back together again."

He wants his credit fixed an admission of wrongdoing and money.

Note: the Defendant attorney's names got switch at the time of print of this article....John Ronayne III is the attorney for Compuware and Judith Caliman is the attorney for DiamelerChrysler.

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05-430

No. 04-2155

IN THE
Supreme Court of the United States

BILL BUTLER,

Petitioner,

v.

DAIMLERCHRYSLER CORPORATION AND COMPUWARE
CORPORATION d/b/a PROFESSIONAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF IN OPPOSITION FOR RESPONDENT
DAIMLERCHRYSLER CORPORATION**

RICHARD M. TUYN
CATEL, TUYN & RUDZEWICZ
33 Bloomfield Hills Parkway
Suite 120
Bloomfield Hills, MI 48304
(248) 593-6400

*Attorneys for Respondent
DaimlerChrysler Corporation*



QUESTIONS PRESENTED

Did the Sixth Circuit Court of Appeals properly affirm that Plaintiff-Petitioner's claims, which were previously litigated in the Michigan state courts, were barred by the doctrine of res judicata?

**CORPORATE DISCLOSURE STATEMENT
PURSUANT TO SUPREME COURT RULE 29.6**

Respondent DaimlerChrysler Corporation, a Delaware Company, is a wholly owned subsidiary of DaimlerChrysler Motors Company LLC, a Delaware company, which is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, a Delaware company, which is a wholly owned subsidiary of DaimlerChrysler AG, a German Corporation whose stock is publicly traded.

DaimlerChrysler AG owns all of the stock of DaimlerChrysler North America Holding Corporation, which is the sole member of DaimlerChrysler Motors Company LLC, which owns all of the stock of DaimlerChrysler Corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported, and is set out at pages 1a-3a of the Appendix to the Brief in Opposition to the Writ of Certiorari. The Order Accepting the Magistrate Judge's Report and Recommendation and the Report and Recommendation of the Magistrate Judge of the District Court are unreported, and are set out at pages 4a-16a of the Appendix to the Brief in Opposition to the Writ of Certiorari.

The Order of the Supreme Court of Michigan is reported at 469 Mich. 1018; 677 N.W.2d 22 (2004). The opinion of the Court of Appeals of Michigan is unpublished, but can be found at 2003 Mich. App. Lexis 3125 (2003), and is set out at pages 17a-18a of the Appendix to the Brief in Opposition to the Writ of Certiorari. The trial court's order is unreported and is set out at pages 19a-24a of the Appendix to the Brief in Opposition to the Writ of Certiorari.¹

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on July 23, 2005. The Petition was filed on August 23, 2005, and docketed on October 4, 2005.

1. Upon review of Plaintiff Petitioner's Appendix, Respondent DaimlerChrysler noticed several typographical errors in the re-typed orders of the lower courts. Therefore, Respondent DaimlerChrysler has attached an appendix containing the actual orders of the lower courts.

RULES INVOLVED

Rule 12(b) of the Federal Rules of Civil Procedure provides:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56 (b), (c), (e) of the Federal Rules of Civil Procedure provides:

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court

may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Plaintiff Petitioner Bill Butler ("Plaintiff" or "Petitioner") filed the instant Complaint on or about March 30, 2004 and served it upon Defendant Respondent, DaimlerChrysler Corporation ("Defendant" or "Respondent"), on April 1, 2004. The Complaint alleges the same claims against the same parties that were previously litigated in the Oakland County Circuit Court, Case No. 00-022028-CL, and appealed to the Michigan Court of Appeals, Case No. 241413 and Michigan Supreme Court, Case No. 125344, 469 Mich. 1018 (2004) (denying application for leave to appeal). In the state court case, Plaintiff alleged a claim of defamation against Defendants DaimlerChrysler and Compuware arising out of alleged false statements made by Defendants to Plaintiff's potential employers.

In his federal court complaint at issue here, Plaintiff did not raise any new allegations that were not raised in his state court claim. Instead, the federal complaint was based on the same facts and allegations as the first action, namely, that the

Defendants defamed Plaintiff during his employment search. Defendants DaimlerChrysler and Compuware filed a Joint Motion to Dismiss Plaintiff's Complaint in federal court in its entirety based upon the Doctrine of Res Judicata. The Honorable Judge Feikens referred the Motion to Magistrate Judge Virginia Morgan for a Report and Recommendation pursuant to 28 U.S.C. § 636(B)(1)(B). Magistrate Judge Morgan heard oral argument from all parties on June 28, 2004. On July 30, 2004, Magistrate Judge Morgan issued her Report and Recommendation, whereby she recommended that Defendants' Motion be granted and the case be dismissed. Plaintiff filed objections to the Report and Recommendation, and Defendant DaimlerChrysler filed a Response to the Objections on August 11, 2004.

The Honorable Judge Feikens issued an Order accepting Magistrate Morgan's Report and Recommendation, after reviewing both the objections filed by Plaintiff and the Response to same filed by Defendant DaimlerChrysler. The Order dismissed Plaintiff's claims in their entirety on August 24, 2004.

Plaintiff then appealed the Order to the Sixth Circuit Court of Appeals. After determining that oral argument was not necessary, the Sixth Circuit affirmed the lower courts, holding that Plaintiff's claims were barred by res judicata because Plaintiff filed a prior action which was decided on its merits, and was raising the same issue against the same defendants. Plaintiff has now filed a Petition for Writ of Certiorari, challenging decisions from the 50th District Court, Oakland County Circuit Court, Michigan Court of Appeals, Michigan Supreme Court, Federal Judicial Council, United States District Court, Eastern District of Michigan, and the Sixth Circuit Court of Appeals.